Supreme Court, U.S.
FILED
071424 MAY 9 - 2008
OFFICE OF THE CLERK

92

No. (1)

In The
Supreme Court of the United States

MANUEL GALLEGOS,

Petitioner,

v.

NATHANIEL QUARTERMAN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

ROBERT N. UDASHEN, P.C.
Counsel of Record
SORRELS, UDAHSEN & ANTON
2301 CEDAR SPRINGS ROAD
SUITE 400
DALLAS, TEXAS 75201
(214) 468-8100

Attorney for Petitioner

May 9, 2008

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTION PRESENTED

1. Whether a lawyer's unexplained failure to present forensic evidence demonstrating that the defendant could not have committed the offense as alleged constitutes ineffective assistance of counsel.

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

OPINION BELOW 1

JURISDICTION 1

RELEVANT PROVISIONS INVOLVED 1

STATEMENT 1

REASONS FOR GRANTING THE PETITION ... 4

A. The *Strickland* Test 4

B. The State's Theory 5

C. Analysis. 7

1. Gallegos' attorneys were deficient. 8

2. Gallegos' counsels' deficiency prejudiced Gallegos' defense. 9

CONCLUSION 10

APPENDIX

Appendix A: February 11, 2008 Fifth Circuit Opinion 1a

Appendix B: June 21, 2005 District Court Order and Judgment 12a

Appendix C: June 13, 2005 District Court Findings, Conclusions and Recommendation of the United States Magistrate Judge 15a

Appendix D: Constitutional and Statutory Provisions 23a

Appendix E: January 13, 2004 Affidavit of Anthony Calisi 28a

Appendix F: February 2, 2004 Affidavit of Anthony Calisi 30a

TABLE OF AUTHORITIES

CASES

Anders v. California,
386 U.S. 738, 87 S.Ct. 1396,
18 L.Ed.2d 493 (1967) 4

Cuyler v. Sullivan,
446 U.S. 335, 100 S.Ct. 1708,
64 L.Ed.2d 333 (1980) 4

McMann v. Richardson,
397 U.S. 759, 90 S.Ct. 1441,
25 L.Ed.2d 763 (1970) 4

Strickland v. Washington,
466 U.S. 668, 104 S.Ct. 2052,
80 L.Ed.2d 674 (1984) 4, 5, 7, 8, 9, 10

United States v. Morrison,
449 U.S. 361, 101 S.Ct. 665,
66 L.Ed.2d 564 (1981) 4

United States v. Rusmisel,
716 F.2d 301 (5th Cir. 1983) 5

CONSTITUTION AND STATUTES

U.S. Const. amend VI 1

28 U.S.C. § 1254(1) 1

28 U.S.C. § 2254 1

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit affirming the district court's judgment is unreported but may be found at 2008 WL 360576. A copy of the opinion is attached in Appendix A.

JURISDICTION

The Fifth Circuit entered its judgment affirming the district court's judgment on February 11, 2008. (App. A). No motion for rehearing was filed in the Fifth Circuit. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS INVOLVED

The relevant text of U. S. Const., amend. VI and 28 U.S.C. § 2254 may be found in Appendix D.

STATEMENT

This is a habeas corpus action brought under 28 U.S.C. § 2254 challenging a state court conviction for murder. Gallegos presented expert evidence in the state habeas court that he could not have fired the bullet that killed the victim as described by an eye witness at Gallegos' trial. (R. 142-50[1]). It is undisputed that Gallegos' trial attorneys did not present any expert forensic evidence to counter trial

---

[1] The trial transcript is cited herein as "Tr." The record filed in the Court of Appeals is cited herein as "R."

testimony that Gallegos shot the victim. Nevertheless, the Fifth Circuit affirmed the district court's denial of Gallegos' request for relief and held that Gallegos failed to establish that he received ineffective assistance of counsel even though forensic evidence would have undermined the State's sole eyewitness. (App. A). In light of the wide-spread use and increasing reliability of forensic evidence, this Court should grant review to resolve the issue of whether a lawyer's unexplained failure to present readily available forensic evidence that a defendant did not commit an offense as alleged constitutes ineffective assistance of counsel.

Procedural History

Gallegos was convicted of the offense of murder and sentenced to confinement in the Institutions Division of the Texas Department of Criminal Justice for fifty years. (R. 42-44). Gallegos appealed his conviction to the Court of Appeals for the Fifth District of Texas, and his conviction was affirmed. (R. 46-54). The Texas Court of Criminal Appeals refused Gallegos' petition for discretionary review. (R. 58).

Gallegos then filed a state court application for habeas relief, and the state habeas court directed his trial lawyers to file affidavits in response to Gallegos' allegation that they were ineffective for failing to present expert forensic evidence at his trial. One of Gallegos' lawyers filed an affidavit conclusorily stating that he and Gallegos' other trial counsel had "provided Applicant Manuel Gallegos with effective assistance of counsel in this case." (App. E). Accordingly, the state

habeas court directed Gallegos' trial lawyers to file another affidavit.

In the second affidavit, one of Gallegos' trial lawyers stated that he had "used due diligence in the preparation for" Gallegos' trial, and that he had retained a "forensic scientist" to assist in preparing for trial. Gallegos' trial lawyers did not: identify the forensic scientist; state what type of forensic scientist was hired; share any opinions from the forensic scientist; or explain why they failed to call the forensic scientist to testify at trial. (App.F). Nevertheless, the state habeas court entered findings of fact and conclusions of law recommending that Gallegos' request for habeas relief be denied. (R. 176). Notably, the state habeas court entered the findings and conclusions without the benefit of an evidentiary hearing. The Texas Court of Criminal Appeals adopted the trial court's findings and denied Gallegos' application for a writ of habeas corpus. (R. 89).

The United States Magistrate Judge reviewed the state habeas decision and found that it was not "objectively unreasonable." (App. C). The district court adopted the Magistrate's findings and denied Gallegos' requested relief. (App. B).

Proceedings on Appeal

The Fifth Circuit affirmed, holding that the district court "properly concluded that Gallegos failed to establish that he received ineffective assistance of counsel." (App. A). Specifically, the Fifth Circuit held that Gallegos did not establish that his lawyers' performance was deficient because his lawyer's

affidavit "states that he hired a forensic expert and obtained evidence for the expert to analyze, indicating that he did some forensic investigation of Gallegos' case." (App. A). The Fifth Circuit also held that Gallegos failed to demonstrate that he was prejudiced by his lawyers' representation: "Gallegos failed to show a reasonable probability that but for his trial counsel's failure to call a forensic expert he would have been found not guilty." (App. A).

REASONS FOR GRANTING THE PETITION

A. The *Strickland* Test

The right to assistance of counsel has long been understood to include a "right to effective assistance of counsel." *See, McMann v. Richardson*, 397 U.S. 759, 771 n. 14, 90 S.Ct. 1441, 1449, 25 L.Ed.2d 763 (1970). The integrity of our criminal justice system and the fairness of our adversary criminal process is assured only if an accused is represented by an effective attorney. *See, United States v. Morrison*, 449 U.S. 361, 364, 101 S.Ct. 665, 667, 66 L.Ed.2d 564 (1981). Absent the effective assistance of counsel "a serious risk of injustice infects the trial itself." *Cuyler v. Sullivan*, 446 U.S. 335, 343, 100 S.Ct. 1708, 1715, 64 L.Ed.2d 333 (1980). Thus, a defendant is constitutionally entitled to have effective counsel acting in the role of an advocate. *See, Anders v. California*, 386 U.S. 738, 743, 87 S.Ct. 1396, 1399, 18 L.Ed.2d 493 (1967).

The United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) established the federal standard for

determining whether an attorney rendered reasonably effective assistance of counsel. Pursuant to that test

> . . . the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Strickland v. Washington, 466 U.S. at 687, 104 S.Ct. at 2064.

An attorney's performance may be deficient even if he has a strategy for doing or not doing something on his client's behalf. The label "trial strategy" does not insulate the attorney from a finding of ineffective assistance of counsel. An attorney's strategy can be so ill-chosen as to render a trial fundamentally unfair. *See, United States v. Rusmisel*, 716 F.2d 301, 310 (5th Cir. 1983). In other words, if the attorney's strategy is objectively unreasonable and that strategy undermines confidence in the outcome of the trial, the attorney should be found ineffective. *See, Strickland v. Washington*, 466 U.S. at 694, 104 S.Ct. at 2068.

B. The State's Theory

The State's prosecutorial theory was summed up in final argument as follows:

> . . . You have Alfredo - excuse me - Albert Ayala who told you, "I saw the defendant with the gun in his hand, chasing after Alfredo Lopez. He stood at him, fired." Remember he said, I saw the fire. I saw what looked like an explosion coming out of the gun." He saw the gun being fired at Freddy.
>
> Then he sees Freddy hit the ground. He said himself that he ducks. He jumps down to the ground because the gun's going off. So you have got the testimony of a eyewitness, Albert Ayala, who tells you that he saw the weapon being fired right at Freddy and he sees Freddy go down.
>
> . . .
>
> Did he intend to? Do you just chase someone down and shoot them in the back if you don't intend to kill them? Do you chase someone down and stand at a distance of may be 20 feet and point a gun at their back and pull the trigger if you don't intend to kill them?

(TR 4, pp. 111-112).

The prosecutor returned to this theory later in her argument when she railed:

> . . . Manuel Gallegos hunted down, chased this child, this kid down and shot him in the back. That's intentional murder. You don't shoot

someone at that distance unless you want to kill them.

(TR 4, p. 140).

C. Analysis.

The Fifth Circuit's decision is an unreasonable application of *Strickland v. Washington*, 466 U.S. 668 (1984), and ignores Gallegos' trial lawyers' total failure to articulate any trial strategy–much less a reasonable one–for failing to present the forensic evidence that Gallegos could not have committed the offense alleged. Based on the testimony of a single eye-witness, Gallegos was convicted of murdering Alfredo Lopez. The witness, Albert Ayala, testified that he saw Gallegos shoot a fleeing Lopez in the back. (Tr. 3, p. 213-16). This testimony, as described above, served as the foundation for the prosecutor's final argument. However, expert analysis of the physical evidence following the trial by Paul Guajardo, a former Texas Department of Public Safety criminalist, showed that Gallegos could not have fired the bullet that killed Lopez.

Guajardo's examination revealed an eight-inch vertical difference from where the fatal bullet entered and exited Lopez's body. (R. 149). Guajardo concluded that based on the size of this vertical difference, Lopez was shot while in a prone position and on the ground, rather than in mid-run as Ayala testified. (R. 149). The Fifth Circuit specifically recognized that Guajardo's expert opinion "calls into question the path of the bullet in relation to the position of Lopez's body when he was shot." App. A). In fact, expert testimony

would have completely undermined the State's sole eyewitness.

In response to Guajardo's expert conclusion, the state habeas court instructed Gallegos' trial lawyers to file affidavits regarding their representation. The first affidavit was *de facto* insufficient. (App. E). The Fifth Circuit's analysis of the second affidavit is two sentences long and is an unreasonable application of the *Strickland* standard:

> Gallegos' trial counsel]'s affidavit states that he hired a forensic expert and obtained evidence for the expert to analyze, indicating that he did some forensic investigation of Gallegos' case. Gallegos has not overcome the presumption we afford [trial counsel]'s trial strategy and decision not to call the forensic expert to the stand at trial.

(App. A).

1. Gallegos' attorneys were deficient.

The Fifth Circuit's holding ignores the undisputed and touchstone fact that Gallegos' trial attorneys did not put forth a strategy for not calling a forensic expert at trial. The Fifth Circuit's holding focuses solely on the unsupported inference that Gallegos' trial lawyers did some forensic investigation of the case even though the record does not establish what forensic investigation was done or why the results of the investigation were not presented to the jury. That Gallegos' lawyers may have performed a forensic investigation is immaterial to the issue of whether

their failure to call a forensic expert witness at trial "falls within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689. Gallegos' trial lawyers had two opportunities to explain their "trial strategy" and they failed to do so.

The record is utterly devoid of any evidence that Gallegos' lawyers' failure to call a forensic scientist to testify at trial falls within the range of reasonable professional assistance. While the Fifth Circuit's opinion is unpublished, it nevertheless stands for the proposition that a defense lawyer can demonstrate that he or she functioned as counsel under the Sixth Amendment merely by averring that a forensic expert was hired and evidence was obtained for the expert to analyze without any explication of what the forensic expert concluded or why the expert was not called to testify. The *Strickland* presumption of reasonableness was burst, and the Fifth Circuit erred by holding otherwise.

2. *Gallegos' counsels' deficiency prejudiced Gallegos' defense.*

Likewise, the Fifth Circuit's holding that Gallegos failed to demonstrate prejudice from his trial counsel's ineffectiveness results from a misapplication of *Strickland*. The Fifth Circuit focuses on the trial testimony of the Medical Examiner that the path of a bullet can be influenced by a number of factors, implying that this was evidence controverting Guajardo's expert testimony that Lopez was shot while in a prone position, and that Gallegos could not have fired the fatal shot if he was standing as Ayala testified–when he fired in the direction of Lopez. (App.

A). However, the record reflects that the Medical Examiner specifically testified that she was unable to determine Lopez's position at the time of the shooting. (Tr. 4, p. 23). The Medical Examiner's testimony does not somehow undermine the significance of Guajardo's affidavit testimony, nor does it render Gallegos' trial lawyers' failure to present forensic testimony harmless.

The Fifth Circuit also touts evidence that Gallegos admitted shooting a gun in Lopez's direction, that a pistol was found in Gallegos' brother's truck, and that Gallegos tested positive for firing a gun the night of the shooting. (App. A). However, there is no evidence that the weapon seized from the vehicle in which Gallegos was riding was the weapon that fired the fatal bullet. The only evidence that Gallegos actually shot Lopez came from Ayala, and it is Ayala's testimony that was contradicted by Guajardo. A forensic expert could have established that Ayala was not telling the truth when he described the manner in which Lopez was shot. The prejudice to Gallegos from the failure to present such evidence is overwhelming.

This Court should grant review to address the wide-reaching effects of the Fifth Circuit's misapplication of this Court's standard in *Strickland*.

CONCLUSION

For the above and foregoing reasons, Petitioner respectfully requests the issuance of a writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

ROBERT N. UDASHEN, P.C.
Counsel of Record

SORRELS, UDASHEN & ANTON
2301 Cedar Springs Road
Suite 400
Dallas, Texas 75201
214-468-8100